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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

\*\*\*\*\*

MAGTEN ASSET MANAGEMENT CORPORATION,

Plaintiff,

-against-

MIKE J. HANSON, JACK D. HAFHEY, ERNIE J.  
KINDT, and ELLEN M. SENECHAL,

Defendants.

Cause No. CV-04-26-BU-RFC

**COMPLAINT AND  
DEMAND FOR JURY TRIAL**

Plaintiff Magten Asset Management Corporation ("Magten"), by its undersigned attorneys,  
hereby alleges in support of its Complaint on personal knowledge as to its own acts and on information  
and belief as to all other matters as follows:

**INTRODUCTION**

1. Magten is a creditor of Clark Fork and Blackfoot, LLC ("Clark Fork"), formerly  
known as NorthWestern Energy, LLC ("NWE"), and prior to that known as The Montana Power  
Company LLC ("MPLLC"). Magten brings this lawsuit to obtain redress for the wrongful actions of  
defendants Mike J. Hanson, Jack D. Haffey, Ernie J. Kindt and Ellen M. Senechal, all of whom were

COMPLAINT AND DEMAND FOR JURY TRIAL

FILED

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EXHIBIT

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1 officers of Clark Fork on November 15, 2002 and enabled the transfer on that date (the "Transaction")  
2 of Clark Fork's key assets — electric, natural gas and propane utility assets (the "Montana Utility  
3 Assets") — to its corporate parent NorthWestern Corporation ("NorthWestern") without adequate  
4 consideration. The Transaction unjustly enriched NorthWestern by hundreds of millions of dollars while  
5 destroying Clark Fork's solvency and thus its ability to meet its obligations to Magten and its other  
6 creditors. The defendants, as officers of Clark Fork, had a fiduciary duty to Clark Fork's creditors not  
7 to engage in transactions that would render Clark Fork insolvent. In connection with the Transaction,  
8 Clark Fork purported to have NorthWestern assume Clark Fork's liabilities, but NorthWestern's other  
9 liabilities were so massive that, even after paying inadequate consideration to Clark Fork for the  
10 Montana Utility Assets, NorthWestern could not pay its own pre-existing creditors, and filed a  
11 voluntary petition for relief under Chapter 11 of the Bankruptcy Code. As a result of defendants'  
12 actions, Magten is now owed well in excess of \$20 million dollars by a company which defendants  
13 rendered unable to meet its obligations to Magten. Magten seeks appropriate compensatory and  
14 punitive damages, in an amount to be determined at trial.

#### 15 THE PARTIES

16 2. Plaintiff is a corporation validly organized and doing business under the laws of the  
17 State of Delaware with its principal place of business in the State of New York and is, therefore,  
18 deemed to be a citizen of Delaware and New York pursuant to 28 U.S.C § 1332(c)(1).

19 3. Defendant Mike J. Hanson is a citizen of the State of Montana and is believed to reside  
20 at 1805 C St., Butte, Montana 59701. As of November 15, 2002, Hanson was Chief Executive  
21 Officer of Clark Fork.

22 4. Defendant Jack D. Haffey is a citizen of the State of Montana, and is believed to reside  
23 at 2101 Garfield St., Anaconda, Montana 59711. As of November 15, 2002, Haffey was President of  
24 Clark Fork.

25 5. Defendant Ernie J. Kindt is a citizen of the State of Montana, and is believed to reside  
26 at 5 Amber Way, Butte, Montana 59701. As of November 15, 2002 Kindt was Vice President and  
27 Chief Accounting Officer of Clark Fork.

28 6. Defendant Ellen M. Senechal is a citizen of the State of Montana, and is believed to

1 reside at 75 Park Drive, Clancy, Montana 59634. As of November 15, 2002, Senechal was Vice  
2 President, Treasurer and Chief Financial Officer of Clark Fork.

### 3 JURISDICTION AND VENUE

4 7. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §  
5 1332, as it is between citizens of different States and the matter in controversy exceeds the sum or  
6 value of \$75,000, exclusive of interest and costs.

7 8. Venue is proper pursuant to 28 U.S.C. 1391, because all defendants reside in this  
8 judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this  
9 judicial district.

### 10 FACTUAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

#### 11 The Montana Power Company

12 9. The Montana Power Company ("Montana Power") was incorporated in 1961 under  
13 the laws of the state of Montana as the successor to a corporation formed in 1912 through the merger  
14 of four regional electric companies.

15 10. By the year 2000, Montana Power was engaged in activities related to  
16 telecommunications and energy related activities including activities in the fields of oil, coal, natural gas,  
17 and electricity.

18 11. In November 1996, Montana Power and Bank of New York entered into that certain  
19 Indenture for Unsecured Subordinated Debt Securities Relating to Trust Securities (the "Indenture").

20 12. Pursuant to the Indenture, Montana Power issued the Junior Subordinated Interest  
21 Debentures (the "Junior Debentures").

22 13. At or about the same time, pursuant to the Amended and Restated Trust Agreement  
23 (the "Trust Agreement") between itself and various other persons, Montana Power created Montana  
24 Power Capital I (the "Trust"), a business trust established pursuant to the Delaware Business Trust Act.  
25 Bank of New York was designated as the Property Trustee of the Trust as well as serving as Trustee  
26 under the Indenture.

27 14. As detailed below, as of November 2002, Clark Fork had succeeded to Montana  
28 Power's obligations with respect to the Junior Indentures. The Bank of New York has been

succeeded as Property Trustee of the Trust as well as Trustee under the Indenture by the Law Debenture Trust Company of New York ("Law Debenture").

15. The Trust is a special purpose vehicle which, pursuant to the Trust Agreement, issued the Series A 8.45% Quarterly Income Preferred Securities ("QUIPS").

16. The Trust holds 100% of the Junior Debentures, with a total face amount of approximately \$67 million, which constitute its sole meaningful asset. The value of the QUIPS is entirely based on the value of the Junior Debentures, and thus on the ability of Clark Fork to pay interest and principal to the Trust. The amounts paid by Clark Fork to the Trust would then in turn be passed on by the Trust to the holders of the QUIPS.

17. The Junior Debentures were not sold directly to investors; rather, purchasing the QUIPS provided investors with substantially the same rights and the same potential investment return as they would have had had they been able to own Junior Debentures directly. The entire structure of the transaction was designed to put investors in the same position as if they had directly purchased the Junior Debentures, while providing Montana Power with a more favorable accounting treatment than would have been possible had the Junior Debentures been sold directly to the investing public.

18. Accordingly, in Section 610 of the Indenture Clark Fork (as successor to Montana Power) expressly acknowledges that the holders of the QUIPS are intended beneficiaries of the Company's obligations with respect to the Junior Debentures and that if the Property Trustee of the Trust (the legal titleholder to the Junior Debentures) fails to act, any holder of the QUIPS can sue directly to enforce the Property Trustee's rights.

19. Magten owns in excess of 33% of the QUIPS.

20. In connection with the Trust Agreement and the Indenture, Montana Power also entered into a Guarantee Agreement with the Bank of New York as Guarantee Trustee (the "Guarantee Agreement"). Pursuant to the Guarantee Agreement, Montana Power, as guarantor, agreed to pay to the holders of the QUIPS certain payments, to the extent such are not paid by the Trust, and to the extent the Property Trustee had funds available in a specified account. As with the Indenture and the Trust Agreement, Clark Fork and Law Debenture have succeeded to the original roles and responsibilities of Montana Power and Bank of New York respectively.



The Sale of the Montana Power Company's Utility Assets

21. On March 28, 2000, Montana Power announced plans to restructure its business. This restructuring involved the sale of its energy related assets, including its electric, natural gas, and propane utility assets, in order to allow Montana Power to focus on telecommunications.

22. On September 29, 2000, Montana Power entered into a Unit Purchase Agreement with NorthWestern, pursuant to which NorthWestern agreed to purchase control of the Montana Utility Assets, then owned by Montana Power, in a multi-step transaction.

23. On February 13, 2002, Montana Power merged its energy assets into MPLLC (the "Merger"). As a result of the Merger, MPLLC thereafter held and operated the Montana Utility Assets and succeeded to all of Montana Power's obligations with respect to the Junior Debentures and the QUIPS.

24. Specifically, in connection with the Merger, on February 13, 2002, pursuant to the First Supplemental Indenture, MPLLC assumed the obligations of Montana Power under the Indenture.

25. In addition, in connection with the Merger, on February 13, 2002, pursuant to a letter agreement, MPLLC assumed the obligations of Montana Power under the Guarantee Agreement.

26. On February 15, 2002, NorthWestern purchased 100% of the equity of MPLLC, and, thus, the corresponding control of the Montana Utility Assets, for \$478 million in cash. None of this consideration was received or retained by MPLLC. It was thus not thereafter available to Clark Fork to assist Clark Fork in meeting its obligations to its creditors.

27. On March 19, 2002, MPLLC was renamed NWE.

28. On August 13, 2002, NorthWestern entered into the Second Supplemental Indenture, whereby it assumed on a joint and several basis with NWE all of NWE's obligations under the Indenture.

29. On August 13, 2002, NorthWestern entered into an Amendment to the Guarantee Agreement, whereby it assumed on a joint and several basis with NWE all of NWE's obligations under the Guarantee Agreement.

30. On August 13, 2002, NorthWestern entered into a letter agreement amending the Trust Agreement, whereby it assumed on a joint and several basis with NWE all of NWE's obligations under

1 the Trust Agreement.

2 **The Transfer**

3 31. On November 15, 2002, defendants, as officers of Clark Fork, carried out a scheme  
4 to defraud, injure and deprive Magten of the ability to receive the benefits due to it from Clark Fork in  
5 connection with the Junior Debentures and the QUIPS, by, in the Transaction, transferring substantially  
6 all of Clark Fork's assets, the Montana Utility Assets, to NorthWestern without receiving adequate  
7 consideration in return. Clark Fork received no cash for the Transfer, and the consideration  
8 purportedly received was dramatically less than the value of the assets; over \$1 billion dollars in assets  
9 were transferred to NorthWestern, and only approximately \$700 million dollars in Clark Fork liabilities  
10 were purportedly assumed by NorthWestern. Indeed, with respect to some if not all of the liabilities  
11 purportedly assumed, NorthWestern was already a co-obligor with Clark Fork prior to the Transaction  
12 and/or Clark Fork remained obligated jointly and severally with NorthWestern subsequent to the  
13 Transaction, thus making any purported assumption of the liabilities in connection with the Transaction  
14 valueless.

15 32. In particular, NorthWestern was already a co-obligor as to Clark Fork's obligations  
16 with respect to the Junior Indentures and QUIPS prior to the transaction, and Clark Fork remained  
17 obligated jointly and severally with NorthWestern with respect to the Junior Indentures and QUIPS  
18 subsequent to the Transaction. Indeed, Clark Fork requested Bank of New York (at the time still the  
19 Trustee under the Indenture) to execute a supplement to the Indenture purporting to release Clark Fork  
20 from its continuing obligations under the Indenture, but Bank of New York refused to provide such a  
21 release.

22 33. As an immediate result of the consummation of the Transfer, Clark Fork was insolvent.  
23 Stripped of its assets, Clark Fork was thereafter unable to meet its obligations with respect to the Junior  
24 Debentures and QUIPS and did not do so.

25 34. Both prior to and following the Transaction, NorthWestern was itself insolvent, making  
26 both its August 2002 assumption of liabilities with respect to the Junior Debentures and QUIPS and any  
27 purported further assumption of those liabilities in connection with the Transaction of little or no value to  
28 the holders of the QUIPS and other creditors of Clark Fork. Even the hundreds of millions of dollars

1 by which it was unjustly enriched by the Transaction were insufficient to overcome the massive  
2 imbalance between assets and liabilities created by its various other failed business ventures.

3 35. The defendants all knew, should have known, and/or were reckless with respect to  
4 knowing that Clark Fork would be rendered insolvent as a result of the Transaction and that  
5 NorthWestern was insolvent both before and after the Transaction.

6 36. No interest on the Junior Debentures was paid by either NorthWestern or Clark Fork  
7 since prior to September 14, 2003. In excess of \$2 million of interest on the Junior Debentures is now  
8 past due. If paid, that interest would have been passed on by the Trust to the holders of the QUIPS  
9 such as Magten. Moreover, the entire principal amount of the Junior Debentures was accelerated  
10 pursuant to the terms of the Indenture no later than September 14, 2003.

11 37. Following the Transaction, Clark Fork retained only the Milltown Dam, a two  
12 megawatt hydroelectric dam at the confluence of the Clark Fork and Blackfoot Rivers, under a license  
13 that expires in 2007, and the related environmental liabilities.

14 38. Following the Transaction, NorthWestern operated the Montana Utility Assets as part  
15 of NorthWestern's NorthWestern Energy Division.

16 39. After the Transaction, NWE remained a subsidiary of NorthWestern and on November  
17 20, 2002, NWE was re-named Clark Fork.

18 40. Clark Fork continues to operate the Milltown Dam.

19 41. Clark Fork is entirely dependent upon NorthWestern for continued funding of the  
20 Milltown Dam and its corporate existence, and NorthWestern is required, under certain agreements  
21 with Clark Fork, which require NorthWestern to pay any costs and expenses that arise in connection  
22 with the operation of the Milltown Dam.

23 42. Less than a year later, on September 14, 2003, NorthWestern filed a voluntary petition  
24 for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the  
25 District of Delaware.

26 43. The Montana Utility Assets generate approximately 80% of NorthWestern's  
27 consolidated EBITDA, although NorthWestern did not pay fair value for those assets, thus injuring  
28 Magten and Clark Fork's other creditors.



1 44. The Montana Utility Assets are now available to all creditors of NorthWestern, most of  
2 whom were not creditors of Clark Fork and thus had not previously had any claim to Clark Fork's  
3 assets. Accordingly, Magten and other QUIPS holders are likely to receive little or no recovery for  
4 their claims in NorthWestern's reorganization plan.

5 45. On April 8, 2004, the United States Bankruptcy Court for the District of Delaware  
6 granted Magten's motion in NorthWestern's bankruptcy case for leave to commence an adversary  
7 proceeding against NorthWestern seeking to have the Transaction set aside as a fraudulent  
8 conveyance.

9 **STATEMENT OF CLAIM**

10 **FIRST CAUSE OF ACTION**

11 **(Breach of Fiduciary Duty)**

12 46. Plaintiff repeats and realleges paragraphs 1-45 and incorporates them herein by  
13 reference.

14 47. Clark Fork was a company within the zone of insolvency on November 15, 2002.  
15 Accordingly, defendants, as officers of Clark Fork, owed individual fiduciary duties to Clark Fork's  
16 creditors, including without limitation the Trust and all QUIPS holders, including Magten's predecessors  
17 in interest, not to engage in any transaction that would make Clark Fork insolvent and thus unable to  
18 perform its obligations with respect to the Junior Debentures and QUIPS.

19 48. The Trust and the QUIPS holders, including Magten's predecessors in interest, were  
20 creditors of Clark Fork, and were injured by the Transaction which transferred the Montana Utility  
21 Assets to NorthWestern without adequate consideration, thereby rendering Clark Fork insolvent.

22 49. The Property Trustee has failed to enforce the Trust's rights, so Magten has standing  
23 under the Indenture to enforce both the Trust's rights and its own individual rights as successor to the  
24 QUIPS holders who were its predecessors in interest.

25 50. Defendants breached their fiduciary duties to the Trust and Magten's predecessors in  
26 interest by willfully and wantonly carrying out the Transaction and transferring the Montana Utility  
27 Assets to NorthWestern without adequate consideration, thereby rendering Clark Fork insolvent.

28 51. Defendants also breached their fiduciary duties to the Trust and Magten's predecessors

1 in interest by purporting to assign Clark Fork's obligations with respect to the Junior Debenture and  
2 QUIPS to NorthWestern, when they knew NorthWestern was insolvent and would remain insolvent,  
3 and would thus be unable to perform those obligations.

4 52. By reason of the foregoing acts, practices and course of conduct, the defendants have  
5 breached their fiduciary duties to the Trust and Magten's predecessors in interest, causing financial loss,  
6 in an amount to be proven at trial, but in excess of \$20 million.

7 53. Punitive damages in an amount to be determined at trial should also be awarded due to  
8 the willful, malicious, and outrageous nature of these breaches of fiduciary duty.

9  
10 **PRAYER FOR RELIEF**

11  
12 WHEREFORE, plaintiff respectfully requests that this Court enter judgment against defendants  
13 as follows:

14 1. Awarding plaintiff compensatory and punitive damages, in an amount  
15 determined at trial but in excess of \$20 million;

16 2. Awarding plaintiff all allowable costs, attorneys' fees and other litigation  
17 expenses to the extent recoverable under law; and

18 3. Awarding plaintiff such other and further relief as to this Court may be just,  
19 proper and equitable.

20 DATED this 15th day of April, 2004.

21  
22 GOETZ, GALLIK & BALDWIN, P.C.

23  
24  
25  
26 By:   
27 For: James H. Goetz

28 ATTORNEYS FOR PLAINTIFF

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED this 15th day of April, 2004.

GOETZ, GALLIK & BALDWIN, P.C.

By: 

James H. Goetz

ATTORNEYS FOR PLAINTIFF

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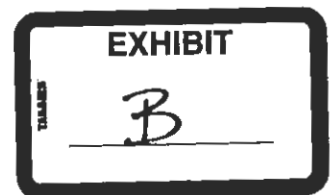
UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----X  
In re: Chapter 11  
Case No.  
NORTHWESTERN CORPORATION, 03-12872 (CGC)

Debtor,  
-----X .

July 27, 2004  
11:59 A.M.

Deposition of MAGTEN ASSET MANAGEMENT  
GROUP, by TALTON EMBRY, taken by Debtor, pursuant  
to Notice and Agreement, at the offices of Paul,  
Hastings, Janofsky & Walker LLP, 75 East 55th  
Street, New York, New York 10022 before Anneliese  
R. Tursi, a Registered Professional Reporter and  
Notary Public within and for the State of New  
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ARTA PASCULLO, President

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17

18

BY: BONNIE STEINGART, ESQ.  
GARY L. KAPLAN, ESQ.  
JORDANA NADRITCH, ESQ.

19

20

ALSO PRESENT:

21

THOMAS J. KNAPP  
NorthWestern

22

23

Daniel R. Fisher, Esq.  
Law Debenture

24

25

1 T. Embry

2 T A L T O N E M B R Y,

3 having been first duly sworn by the  
4 Notary Public (Anneliese R. Tursi), was  
5 examined and testified as follows:

6 EXAMINATION BY MR. COUSINS:

7 Q. My name is Scott Cousins.

8 Could you state your full name  
9 for the record, please.

10 A. Talton, T-A-L-T-O-N, Robert,  
11 R-O-B-E-R-T, Embry, E-M-B-R-Y.

12 Q. Mr. Embry, could I have your  
13 business address and phone number, please?

14 A. 410 Park Avenue, 14th floor, New  
15 York, New York, 10022. 212-813-0900.

16 Q. And by whom are you employed?

17 A. I'm not employed.

18 Q. Are you a consultant?

19 A. No.

20 Q. What are, other than investments,  
21 what are your sources of income?

22 MS. STEINGART: I'm sorry, you  
23 are asking him working income or  
24 wealth?

25 MR. COUSINS: Working income. I

1 T. Embry

2 don't care about his wealth.

3 MS. STEINGART: Okay.

4 A. None.

5 Q. What is your relationship to  
6 Magten?

7 A. I own it.

8 Q. What is your percentage of  
9 ownership in Magten?

10 A. 100 percent.

11 Q. Do you have any unpaid positions  
12 with Magten?

13 A. I call myself chairman.

14 Q. Do you have any employee or  
15 officer positions with Magten?

16 A. I have a secretary.

17 MS. STEINGART: I'm sorry, do you  
18 mean does he have positions or did he  
19 have others in positions?

20 MR. COUSINS: No, he --

21 MS. STEINGART: You want to know  
22 if he holds any other titles besides  
23 chairman in connection with Magten?

24 MR. COUSINS: Yes.

25 A. Not that I'm aware of.



1 T. Embry

2 Q. And how many employees does  
3 Magten have?

4 A. One.

5 Q. Who is that?

6 A. Jean Colditz, C-O-L-D-I-T-Z.

7 Q. In what is Jean's position?

8 A. She is a secretary.

9 Q. Mr. Embry, what did you do to  
10 prepare for today's deposition?

11 A. I met with my counsel beforehand.  
12 I went over the documents that I had submitted  
13 to you, and we talked about what questions  
14 might be asked.

15 Q. Did you only review the documents  
16 that were submitted?

17 A. I believe that's correct.

18 Q. Have you ever been deposed  
19 before?

20 A. I have.

21 Q. And what context, please?

22 A. Numerous times.

23 Q. Can you start with the most  
24 recent?

25 A. I don't know what the most recent

1 T. Embry

2 was. I'm sure there have been some between  
3 1993 and today, but I can't remember what they  
4 are.

5 In 1993 I had a disciplinary  
6 action with Securities and Exchange Commission  
7 and was deposed on that.

8 During that same time frame, I  
9 was a witness for the U.S. Attorney's Office  
10 in a securities fraud.

11 The first time that I can  
12 remember being deposed was in the Unocal  
13 takeover, I think, by Carl Icahn going back in  
14 the '80s.

15 Q. To what did the disciplinary  
16 action by the S.E.C. relate?

17 A. It related to my being -- signing  
18 consent that I had taken an opportunity that  
19 should have been my client's, that I returned  
20 money that I had made on it, plus interest,  
21 and on paper -- my books and records were not  
22 perfect.

23 Q. And were you employed at the time  
24 of this disciplinary action?

25 A. Yes.

1 T. Embry

2 Q. By whom?

3 A. Magten Asset Management.

4 Q. How long have you been with  
5 Magten?

6 A. 1978.

7 Q. And since 1978 have you always  
8 owned 100 percent of the equity of Magten?

9 A. No.

10 Q. In 1978, what was the equity  
11 ownership of Magten?

12 A. I think I owned 50 percent and a  
13 fellow, Angus Douglass owned the other 50  
14 percent.

15 Q. When did Mr. Douglass dispose of  
16 his interests in Magten?

17 A. Sometime in the early '80s.

18 Q. Did he transfer that interest to  
19 you?

20 A. Yes.

21 Q. So since the early '80s, you have  
22 owned 100 percent of Magten?

23 A. Yes.

24 Q. Now, what was your role with  
25 respect to the Unocal case?

1 T. Embry

2 A. I had proffered to buy  
3 subordinated debt in the new company to be  
4 formed in the buyout of Unocal.

5 Q. Did you get embroiled in the  
6 Chance report litigation over Unocal with  
7 Icahn, is that --

8 MS. STEINGART: I object to form.  
9 Do you want to ask if he was a witness  
10 or a party in the dispute, maybe that  
11 will help.

12 Q. Why were you asked to testify in  
13 connection with Unocal?

14 A. Because I had offered to buy some  
15 of the subordinated securities of the new  
16 company.

17 Q. And who deposed you?

18 A. Skadden Arps.

19 Q. Who was -- who was Skadden  
20 representing?

21 A. Unocal.

22 Q. Did you testify at trial?

23 A. No.

24 Q. Does Magten have any affiliates?

25 A. What is an affiliate?



1 T. Embry

2 Q. Let me show you a definition of  
3 affiliate.

4 MR. COUSINS: Can you mark as D-1  
5 a document Order Permitting Securities  
6 Trading Upon Establishment of Ethical  
7 Wall in the NorthWestern Corp.  
8 bankruptcy.

9 (Document entitled "Order  
10 Permitting Securities Trading  
11 Upon Establishment of Ethical  
12 Wall (Re: Docket No. 257)" marked  
13 Debtor's Exhibit 1 for  
14 identification, as of this date.)

15 MS. STEINGART: Do you want to  
16 direct his attention to something?

17 Q. Mr. Embry, if it is easier, the  
18 reporter will mark it and then both you and  
19 your counsel can have a copy.

20 If you turn to about five pages  
21 in, there is a page marked "Definitions" and  
22 there is a definition of affiliate.

23 Could you read that definition to  
24 yourself and let me know if you have an  
25 understanding as to what an affiliate is?

1 T. Embry

2 (Witness and counsel confer.)

3 MR. COUSINS: Let the record  
4 reflect that deponent referred --

5 MS. STEINGART: Consulted with  
6 counsel.

7 MR. COUSINS: Consulted with  
8 counsel.

9 A. Not that I'm aware of.

10 Q. So that was a response to my  
11 question, does Magten have any affiliates?

12 A. Yes.

13 Q. What are your day-to-day duties  
14 and responsibilities with respect to Magten?

15 A. I don't have any duties.

16 Q. Do you have any responsibilities?

17 A. I invest money.

18 Q. What type of business is Magten  
19 in?

20 A. Buys and sells investments.

21 Q. Any particular investments?

22 MS. STEINGART: Excuse me. You  
23 want to know what the holdings of  
24 Magten are, because I'm not going to  
25 let him describe other things in which

1 T. Embry

2 they have an interest until I ascertain  
3 if they are publicly reported. I'm not  
4 going to let him talk about the other  
5 things.

6 If you want to ask him if he  
7 invests in equities or debt or that  
8 kind of thing or the full panoply, but  
9 before we get into other individual  
10 investments, I would have to consult  
11 with him.

12 MR. COUSINS: I don't know what  
13 that means.

14 Q. What type of investments does  
15 Magten invest in?

16 A. Bonds, preferreds, stocks.

17 Q. Does it have any other types of  
18 investments other than securities?

19 A. It has an investment in one  
20 partnership.

21 Q. What is the business of the  
22 partnership?

23 A. Owns athletic clubs.

24 Q. What types of bonds does Magten  
25 invest in?

1 T. Embry

2 MS. STEINGART: I'm sorry, I  
3 didn't hear the last word.

4 Q. What types of bonds does Magten  
5 invest in?

6 A. Generally lower grade bonds.

7 Q. Does Magten invest in any bonds  
8 that trade at par?

9 A. We have.

10 Q. Do you currently hold any par  
11 investments in bonds?

12 A. Yes.

13 Q. Now, your investment in bonds,  
14 are those acquired off of exchanges, public  
15 exchanges?

16 A. Is that today?

17 Q. Yes.

18 A. No.

19 Q. The bonds that you currently  
20 hold, how are they acquired?

21 A. Purchased through a broker.

22 Q. You mentioned preferred. Were  
23 you referring to preferred stock or some  
24 preferred type of debt instrument?

25 A. Preferred stock.



1 T. Embry

2 Q. Preferred stock that Magten  
3 currently holds, how was that acquired?

4 A. Through open market purchases.

5 Q. And does Magten hold any stock  
6 other than preferred?

7 A. Yes.

8 Q. And how does Magten acquire stock  
9 other than preferred?

10 A. Open market purchases.

11 Q. Other than Magten's interest in  
12 the partnership you referred to, does Magten  
13 hold any other investments other than bonds,  
14 preferred stock, stock?

15 A. Not that I'm aware of.

16 Q. When did Magten start investing  
17 in the lower grade securities?

18 A. 1978.

19 Q. Would you say that Magten is  
20 experienced in investing in lower grade  
21 securities?

22 A. I would say that we have done it.

23 Q. Well, you have done it since  
24 1978, right?

25 A. Right.

1 T. Embry

2 Q. And you are doing it today,  
3 right?

4 A. Right.

5 Q. You wouldn't say that you are  
6 experienced in lower grade investments?

7 A. I may be in the business, but  
8 naive.

9 Q. So would you consider yourself a  
10 naive investor?

11 A. I don't know. Experience is not  
12 a word that I know the exact definition.

13 Q. How would you characterize the  
14 acumen of Magten with respect to investments?

15 A. What do you mean?

16 Q. Would you consider yourself a  
17 novice?

18 A. No.

19 Q. Would you consider yourself a  
20 veteran?

21 A. I -- I have been at it a long  
22 time, yes. Veteran is a good word.

23 Q. Would you consider Magten a  
24 sophisticated investor?

25 A. There is an exact definition of

1 T. Embry

2 that and I'm not sure that we are or not.

3 Q. Why does Magten invest in lower  
4 grade investments?

5 A. In the hopes of making a profit.

6 Q. And is Magten profitable?

7 A. No.

8 Q. When was the last time Magten was  
9 profitable?

10 A. It was profitable last year, but  
11 not the year before.

12 Q. And for the first six months of  
13 2004, has Magten been profitable?

14 A. No.

15 Q. Do you understand the risks  
16 associated with trading in lower grade  
17 investments?

18 MS. STEINGART: Object to the  
19 form.

20 Q. You can answer.

21 A. Not always.

22 Q. You have been in business since  
23 1978 and you don't understand risks associated  
24 with trading in lower grade investments?

25 MS. STEINGART: Object to the

1 T. Embry

2 form.

3 Q. You can answer.

4 A. Repeat the question.

5 MR. COUSINS: Could you read that  
6 back, please.

7 (Record read.)

8 A. Not all of them.

9 Q. Who made the decision for Magten  
10 to acquire the NorthWestern QUIPS?

11 Do you know what I mean by the  
12 QUIPS?

13 A. Yes, I do.

14 Q. Who made that decision?

15 A. I did.

16 Q. What was that decision based  
17 upon?

18 A. Based upon my review of the  
19 company.

20 Q. And what did you do to review the  
21 company?

22 A. I read the 10-Q's and 10-K,  
23 10-K's, 2001, 2002, and I guess the first  
24 quarter of 2003.

25 Q. Did you review the April 1, 2002

1 T. Embry

2 10-K?

3 A. April 1st which year?

4 Q. 2002.

5 A. I believe so.

6 Q. Did you review the April 16, 2003

7 10-K?

8 A. I can't certify the date, but I  
9 reviewed the 2002 10-K.

10 Q. Well, when you say the 2002 10-K,  
11 are you talking about the 10-K that came out  
12 in 2002?

13 A. No, 10-K for fiscal year,  
14 calendar year 2002.

15 Q. So you read a 10-K in 2003 that  
16 related to fiscal year 2002?

17 A. Yes, sir.

18 Q. Let's talk about due diligence  
19 that Magten typically performs before making  
20 an investment.

21 Do you normally look at S.E.C.  
22 filings?

23 A. I do.

24 Q. Do you review any other public  
25 filings?

1 T. Embry

2 A. What I'm aware of.

3 Q. Do you typically review an

4 indenture for indebtedness?

5 A. I do.

6 Q. And for preferred stock, do you

7 typically review the stock certificates with a

8 designation of rights?

9 MS. STEINGART: Designation of?

10 MR. COUSINS: Rights.

11 A. It depends upon the situation.

12 Q. What is that dependent upon?

13 A. It is dependent upon generally

14 whether a company is in arrears or not.

15 Q. And if a company is in arrears,

16 what do you do?

17 A. I look to see what the

18 consequences of the arrearage is.

19 Q. If there is an arrearage, would

20 you then look at the stock certificate or

21 designation of rights?

22 A. Generally, yes.

23 Q. Does Magten use outside

24 professionals in connection with its review of

25 potential investments?



1 T. Embry

2 A. No.

3 Q. Is that, you never use outside  
4 professionals?

5 A. I have on other times.

6 Q. In connection with the QUIPS, did  
7 you use outside professionals?

8 A. I hired Fried, Frank, Harris  
9 Shriver & Jacobson.

10 Q. You hired them prior to your  
11 acquisition of the QUIPS?

12 A. After my acquisition of the  
13 QUIPS.

14 Q. So in connection with your  
15 investment in the QUIPS, you were the only  
16 Magten officer that reviewed the documentation  
17 prior to investing in the QUIPS?

18 MS. STEINGART: I object to the  
19 form.

20 A. Yes.

21 Q. Have you ever hired an investment  
22 banker in connection with a potential  
23 acquisition?

24 MS. STEINGART: A potential  
25 acquisition?

1 T. Embry

2 MR. COUSINS: Yes. Of

3 securities.

4 A. No.

5 Q. Accountants. The same question.

6 A. No.

7 Q. When did Magten first acquire an

8 interest in any of the NorthWestern

9 securities?

10 A. The end of April 2003.

11 Q. And what did Magten acquire?

12 A. It acquired shares of preferred

13 stock of Montana Power.

14 Q. How many shares?

15 A. Approximately a million.

16 Q. And you acquired those shares

17 over the open market?

18 A. I did.

19 Q. Subsequent to the acquisition of

20 the preferred shares, has Magten bought

21 additional preferred shares?

22 A. I don't -- I don't understand the

23 question.

24 Q. How many shares of preferred

25 shares of NorthWestern does Magten currently

1 T. Embry

2 hold?

3 A. In excess of a million shares.

4 Q. When was the next time that you  
5 acquired or disposed of preferred shares?

6 A. Last week, the week before last,  
7 I don't recall.

8 MS. STEINGART: His question is  
9 after the initial purchase that you  
10 made that you testified about at the  
11 end of April 2003, when is the next  
12 occasion that you recall having bought  
13 or sold.

14 A. It would be May.

15 Q. May?

16 A. 2003.

17 Q. And what did you buy or sell?

18 A. We purchased, I purchased.

19 Q. How many?

20 A. I have misspoken, or I didn't  
21 understand a question.

22 MS. STEINGART: Okay.

23 A. We own in excess of a million  
24 shares. We purchased them over time in the  
25 open market. After I bought shares one day, I

1 T. Embry

2 bought more shares the next day, the day after  
3 that.

4 Q. Have you disposed of any shares  
5 since your initial purchase?

6 A. Yes.

7 Q. Do you know when you disposed of  
8 shares?

9 A. I do not.

10 Q. Did you dispose of shares during  
11 the bankruptcy?

12 MS. STEINGART: I'm sorry. When  
13 was the bankruptcy filed? Can we put a  
14 date on that just so we --

15 MR. CHIPMAN: September 14th.

16 MS. STEINGART: September 14,  
17 2003?

18 MR. RATNER: Yes.

19 A. Yes.

20 Q. Did you acquire or sell preferred  
21 shares while Magten was a member of the  
22 creditors committee?

23 A. We did.

24 Q. Do you recall whether it was an  
25 acquisition or --

1 T. Embry

2 A. It was an acquisition.

3 Q. Do you recall when or how much?

4 A. I recall that we purchased 1,000  
5 shares after my first creditors meeting. I  
6 don't know how much we purchased prior to  
7 that.

8 We had sought advice of counsel  
9 as to the propriety of it and once I went on  
10 to the creditors committee, I ceased  
11 purchasing and tried to get a trading paper  
12 such as you have before me.

13 Q. That trade was after Magten was  
14 appointed to the creditors committee?

15 A. That was after my first meeting  
16 with the creditors committee.

17 Q. Was Magten a member of the  
18 committee at that point?

19 A. Yes, it was.

20 Q. D-1, Exhibit 1, on the same page,  
21 it lists the members. Do you see that in the  
22 definition section?

23 Is Magten listed as a member of  
24 the committee?

25 MS. STEINGART: I'm sorry, D-1,

1 T. Embry

2 where are we looking, sir?

3 MR. COUSINS: "Definitions."

4 MS. STEINGART: Oh, members.

5 A. No.

6 Q. And do you have an understanding

7 as to why Magten was not listed on this?

8 A. No.

9 MS. STEINGART: Well, he didn't  
10 prepare the document.

11 MR. COUSINS: I'm asking for his  
12 understanding.

13 MS. STEINGART: Okay.

14 A. No.

15 Q. If you turn to the last page of  
16 D-1, it is a document called "Unbound-by-Order  
17 Notice Regarding Order Permitting Securities  
18 Trading Upon Establishment of Ethical Wall."

19 Did I read that correctly?

20 A. I believe so.

21 Q. Has Magten ever filed one of  
22 these with the Bankruptcy Court?

23 A. No.

24 Q. Now, we talked about preferred  
25 shares.



1 T. Embry

2 Did Magten acquire any other  
3 securities after the end of April 2003 in  
4 NorthWestern?

5 A. Yes.

6 Q. Just so I got my nomenclature  
7 right, preferred shares, are you referring to  
8 QUIPS or preferred stock?

9 A. In what context?

10 Q. Well, tell me what the security  
11 is that Magten currently holds?

12 A. We bought QUIPS.

13 Q. Do you have an understanding as  
14 to whether QUIPS, the priority of payment of  
15 QUIPS --

16 MS. STEINGART: I'm sorry, I  
17 don't understand.

18 Q. -- are they subordinated?

19 MS. STEINGART: In the plan, you  
20 mean?

21 MR. COUSINS: No, his  
22 understanding of the security.

23 A. They are subordinated.

24 MS. STEINGART: I see.

25 Q. Do you have an understanding as

1 T. Embry

2 to what they are subordinated to?

3 A. Yes.

4 Q. To what are they subordinated?

5 A. To the medium term notes of  
6 Montana Power and the first mortgage notes of  
7 Montana Power.

8 Q. Are they subordinated to the  
9 senior unsecured notes?

10 A. The ones I just mentioned.

11 Q. Are they subordinated to trade  
12 debt?

13 A. No.

14 Q. Are they senior to trade debt or  
15 pari passu, I guess is the only alternative?

16 A. I believe, although I may have  
17 been wrong as to whether they are pari passu  
18 or whatever the prior question was, normally,  
19 they would be pari passu with trade debt, and  
20 I can't remember whether these are any  
21 different.

22 Q. Do you know whether -- well, have  
23 you ever invested in any other QUIPS in any  
24 other cases?

25 MS. STEINGART: In any other

1 T. Embry

2 companies or cases?

3 MR. COUSINS: Sure. Cases or

4 companies.

5 A. Yes.

6 Q. And what cases or companies?

7 A. AES, Kalpine. K-A-L-P-I-N-E, I  
8 believe.

9 Q. Any others?

10 A. Not that I can -- I'm not even  
11 sure of those two.

12 Q. Can you describe the nature of  
13 QUIPS: Are they equity, are they debt, are  
14 they a quasi instrument?

15 A. They are debt.

16 Q. At the time of the transfer of  
17 assets from Clark & Blackfut, was Magten a  
18 creditor of Clark & Blackfut?

19 A. No.

20 Q. At the time of the transfer of  
21 assets from Clark & Blackfut, was Magten a  
22 creditor of NorthWestern?

23 A. No.

24 Q. Now, we talked generally about  
25 the due diligence you do and you talked about

1 T. Embry

2 the Q's and the K's you looked at in  
3 connection with NorthWestern.

4 Did you look at the indenture  
5 prior to the acquisition of the securities?

6 A. I can't recall.

7 Q. Did you review the first  
8 supplemental indenture?

9 A. In the time up to today?

10 Q. I'm sorry. I will be a little  
11 clearer.

12 Prior to your acquisition of the  
13 QUIPS, did you review the indenture?

14 A. I don't know.

15 Q. And prior to your acquisition of  
16 the QUIPS, did you review the first  
17 supplemental indenture?

18 A. I don't know.

19 Q. Prior to your acquisition of the  
20 QUIPS, did you review the second supplemental  
21 indenture?

22 A. I don't know.

23 Q. Prior to your acquisition of the  
24 QUIPS, did you review the third supplemental  
25 indenture?

1 T. Embry

2 A. I don't know.

3 Q. Prior to your acquisition of the  
4 QUIPS, did you review the amendment to  
5 guarantee agreement?

6 A. I don't know.

7 Q. Prior to your acquisition of the  
8 QUIPS, did you review the guarantee agreement?

9 A. I don't know.

10 THE WITNESS: May I?

11 MS. STEINGART: Is there a  
12 question pending? If there is not a  
13 question, he would like to consult with  
14 counsel. If there is not a question --

15 MR. COUSINS: There isn't a  
16 question, but I have to object to you  
17 guys consulting.

18 MS. STEINGART: If the witness  
19 wants to ask me a question, that's why  
20 I'm here. So if you have an objection,  
21 put your objection on the record.

22 (Witness and counsel confer.)

23 MR. COUSINS: I will note that  
24 the witness and his advisor are  
25 consulting.

1 T. Embry

2 I'm going to explore whether it  
3 is a -- it is a question of privilege  
4 and the counsel has not instructed the  
5 witness not to answer on that basis.

6 MS. STEINGART: We have consulted  
7 and there is not a privilege involved.

8 You refer to one purchase. The  
9 witness has already testified that  
10 there was more than one purchase and  
11 all the questions that you are asking,  
12 are prefaced with the initial purchase.

13 MR. COUSINS: That's right.

14 MS. STEINGART: I'm just  
15 reminding you of that scenario because  
16 the witness has a concern that you may  
17 misinterpret his answers.

18 MR. COUSINS: Okay.

19 Q. Mr. Embry, what did you and  
20 counsel just confer about?

21 MS. STEINGART: No, he is not  
22 answering that question.

23 MR. COUSINS: You refreshed his  
24 recollection.

25 MS. STEINGART: I'm telling you



1 T. Embry

2 that that conversation is privileged  
3 and I'm instructing him not to answer.

4 You may ask the witness about the  
5 subject matter that you were pursuing  
6 before we had a discussion concerning  
7 that which was calculated to determine  
8 if there were -- if he could embellish  
9 on answers without violating privilege  
10 and he is not going to reveal the  
11 conversation I had with him.

12 MR. COUSINS: I'm going to ask  
13 about the subject matter. You  
14 refreshed his recollection.

15 Q. Did you consult with your  
16 attorney during the deposition?

17 MS. STEINGART: He is not going  
18 to answer that question. The record  
19 reflects -- I'm instructing him not to  
20 answer.

21 The record reflects that on one  
22 occasion, before he consulted with me  
23 while no question was pending, and just  
24 a couple of minutes ago he consulted  
25 with me while no question was pending,

1 T. Embry

2 and the substance of his consultation  
3 with me, I consider to be privileged,  
4 and I am instructing the witness not to  
5 answer.

6 MR. COUSINS: Deutschman v.  
7 Beneficial Corp., are you familiar with  
8 Deutschman?

9 MS. STEINGART: Do I remember  
10 Deutschman? No, I don't remember  
11 Deutschman.

12 MR. COUSINS: Okay.

13 Q. We are still talking about prior  
14 to your first acquisition.

15 Did you review the trust which  
16 holds the QUIPS?

17 A. I don't recall.

18 Q. Did you review the amended and  
19 restated trust agreement?

20 A. In what time period? I forgot.

21 Q. Prior to your first acquisition  
22 of the QUIPS.

23 A. Oh, I don't recall.

24 Q. Prior to your first acquisition  
25 of the QUIPS, did you review the November 15,

1 T. Embry

2 2002 asset and stock transfer agreement?

3 A. I don't recall.

4 Q. Prior to your first acquisition  
5 of the QUIPS, did you review the unit purchase  
6 agreement with Montana dated September 29,  
7 2000?

8 A. I don't recall.

9 Q. Prior to your first acquisition  
10 of the QUIPS, did you review any FERC filings  
11 made by NorthWestern?

12 A. I don't recall.

13 Q. Are you familiar with what's been  
14 called the going-flat transaction?

15 A. I am.

16 Q. When did you first become aware  
17 of the going-flat transaction?

18 A. In reviewing the company's 10-Q,  
19 the quarter-ending September 30, 2002.

20 MS. STEINGART: He wants to know  
21 when you did that.

22 A. In reviewing that document.

23 Q. Did you review that document  
24 prior to your acquisition of the QUIPS, your  
25 initial acquisition of the QUIPS?

1 T. Embry

2 A. I believe so.

3 Q. Did you have an understanding at  
4 the time that you reviewed that 10-Q whether  
5 FERC authorization was necessary for the  
6 consummation of the going-flat transaction?

7 A. No.

8 Q. Prior to your initial acquisition  
9 of the QUIPS, did you review any Montana  
10 Public Service Commission filings?

11 A. I do not recall.

12 Q. Prior to your initial acquisition  
13 of the QUIPS, did you review any press  
14 releases of NorthWestern?

15 A. Yes.

16 Q. Do you recall which ones?

17 A. No.

18 Q. Do you recall when you reviewed  
19 the press releases?

20 A. No.

21 Q. Prior to your initial acquisition  
22 of the QUIPS, how did you familiarize yourself  
23 with the going-flat transaction?

24 A. The company said in its September  
25 30, 2002 10-Q that those would be the last

1 T. Embry  
2 published figures of Montana Power as a  
3 separate entity.

4 Q. Did you do any further due  
5 diligence with respect to the going-flat  
6 transaction, at that time?

7 A. That's overly broad.

8 MS. STEINGART: He is asking you  
9 if you looked at any other documents  
10 that informed you or described the  
11 going-flat transaction.

12 Is that fair?

13 MR. COUSINS: Sure.

14 A. Whatever was -- I don't recall.

15 Q. Can you give me a time frame as  
16 to when you were reviewing the public filings  
17 in relationship to when you first acquired the  
18 QUIPS?

19 A. I don't know.

20 Q. Prior to acquiring your initial  
21 acquisition of the QUIPS, did you -- what due  
22 diligence did you do immediately prior to your  
23 first acquisition of the QUIPS?

24 MS. STEINGART: Object as to  
25 form. By immediately, do you mean a

1 T. Embry

2 day, a month?

3 MR. COUSINS: Whatever his  
4 understanding is. Bonnie, we can do it  
5 that way.

6 Q. A week before.

7 THE WITNESS: What was the  
8 question?

9 (Record read.)

10 A. I read the public documents of  
11 Montana Power registered with the S.E.C. in  
12 the S.E.C. system, and public documents in the  
13 S.E.C. system of NorthWestern Corp.

14 Q. Did you review any other  
15 documents?

16 A. Press releases. If there was  
17 anything from Wall Street that came in across  
18 my desk, I don't know.

19 Q. Wall Street, are you referring to  
20 analysts' reports?

21 A. Yes.

22 Q. Which analysts' reports do you  
23 recall reviewing at that time?

24 A. Merrill Lynch for certain. I  
25 don't recall any others.

1 T. Embry

2 Q. At the time prior to the  
3 acquisition of the QUIPS, were you satisfied  
4 with your understanding of the going-flat  
5 transaction?

6 A. Yes.

7 MR. COUSINS: Off the record,  
8 please.

9 (Discussion held off the record.)

10 MR. COUSINS: Handing the  
11 reporter what I would like to mark as  
12 D-2.

13 (U.S. Bankruptcy Court, District  
14 of Delaware, Notice of Electronic  
15 Filing with attachments marked  
16 Debtor's Exhibit 2 for  
17 identification, as of this date.)

18 Q. Mr. Embry, have you seen -- you  
19 have to pass the first page which is a  
20 Bankruptcy Court filing.

21 A. Um-hmm.

22 Q. Do you recognize this document?

23 MS. STEINGART: So starting with  
24 page 3, do you recognize the document?

25 A. I believe that it is the request



1 T. Embry

2 for a deposition that was served on me or  
3 served on me through Fried, Frank.

4 Q. And did you assist in collating  
5 the documents requested herein?

6 A. Yes.

7 Q. Mr. Embry, if you can turn to  
8 Exhibit A, it is probably about four pages  
9 back.

10 What I'm going to ask you is  
11 whether you are the person most knowledgeable  
12 at Magten with respect to each of those  
13 paragraphs.

14 Rather than reading it, if I  
15 could ask you and please read it, I don't want  
16 to demand a fast answer.

17 MS. STEINGART: Could I -- are  
18 you asking him whether he is most  
19 knowledgeable about the collection of  
20 documents or about the substance of the  
21 request for the documents?

22 MR. COUSINS: The topics.

23 MS. STEINGART: Okay.

24 A. Yes.

25 Q. So with respect to 1 through 7 --

1 T. Embry

2 A. Yes.

3 Q. -- in response to the discovery,  
4 what did you do to collate documents?

5 A. I sent all of the papers I had  
6 and all the e-mails I had to Fried, Frank.

7 Q. Do you recall, Mr. Embry, when  
8 Magten was appointed to the creditors  
9 committee in NorthWestern?

10 A. I don't remember the date.

11 Q. How did Magten get appointed to  
12 the creditors committee?

13 A. We were appointed by the U.S.  
14 Trustee.

15 Q. And did the U.S. Trustee appoint  
16 Magten to the committee at the initial  
17 organizational meeting of creditors, do you  
18 recall?

19 A. No.

20 Q. Do you have an understanding as  
21 to how the U.S. Trustee came about to appoint  
22 Magten after the organizational meeting?

23 A. We requested the appointment  
24 through Fried, Frank.

25 Q. So Fried, Frank wrote a letter to

1 T. Embry

2 the U.S. Trustee; is that correct?

3 A. That is correct.

4 Q. Do you recall which month you  
5 were appointed to the committee?

6 A. I believe it was November.

7 Q. And Magten is no longer a member  
8 of the committee; is that correct?

9 A. That's correct.

10 Q. Why?

11 MS. STEINGART: Objection to the  
12 form.

13 A. We were taken off the committee,  
14 I believe, by the U.S. Trustee.

15 Q. Do you have an understanding as  
16 to why the U.S. Trustee took Magten off the  
17 committee?

18 A. No.

19 Q. Were you asked --

20 A. I'm sorry, what is an  
21 understanding? I mean, I understand the legal  
22 argument. I don't understand why he did it.

23 Q. What is the legal argument?

24 A. The legal argument was that we  
25 were trying -- that if Magten was successful

1 T. Embry

2 in its suit, that the requested remedy would  
3 remove assets from the estate and there is, I  
4 believe, that there is something in the  
5 Bankruptcy Code or I have been told that --

6 MS. STEINGART: Certainly don't  
7 reveal your conversations with counsel.

8 A. -- that that gave the U.S.  
9 Trustee the ability to object to our presence  
10 on the committee.

11 Q. Do you recall the letter to your  
12 counsel removing Magten from the committee?

13 A. No.

14 Q. Did you ever see it?

15 A. Yes.

16 Q. Prior to being taken off the  
17 committee by the U.S. Trustee, did the  
18 committee or its professionals ask that Magten  
19 resign from the committee?

20 A. Yes.

21 Q. And when was that?

22 MS. STEINGART: I'm not sure what  
23 the relevance of all of this is, but it  
24 is your afternoon.

25 MR. COUSINS: Thank you. I can

1 T. Embry

2 tell you the relevance. You don't want  
3 to hear it.

4 MS. STEINGART: Well, no, I'm  
5 happy to hear it.

6 A. The --

7 MS. STEINGART: But let's answer  
8 the question.

9 THE WITNESS: Repeat it for me.

10 (Record read.)

11 MR. RATNER: Let me intercede  
12 here for the record and make an  
13 observation that any conversations that  
14 were taking place in the committee  
15 while Magten was a member of the  
16 committee were confidential, so there  
17 was a lot of privileged information  
18 that was exchanged and I would reserve  
19 the committee's privilege.

20 It still is a committee privilege  
21 and I would ask that that be noted for  
22 the record. The committee would like  
23 to keep its privilege vis-a-vis  
24 conversations that were taking place.  
25 Any nonprivileged information, the

1 T. Embry

2 witness may testify to, but privileged  
3 communications --

4 MS. STEINGART: I don't remember  
5 the question. The question was about  
6 conversations concerning a request to  
7 resign.

8 MR. RATNER: If there was any  
9 advice imparted during those meetings,  
10 he mentioned the professionals at this  
11 meeting.

12 MR. COUSINS: I erred if I asked  
13 about conversations and I'm not going  
14 to deliberately go into that.

15 MS. STEINGART: If we can just  
16 have the question again.

17 (Record read.)

18 THE WITNESS: Do you have  
19 anything to say?

20 MR. RATNER: I have stated my  
21 objection on the record.

22 A. The committee's professionals  
23 requested that we resign.

24 Q. And do you have an understanding  
25 as to why the committee's professionals asked

1 T. Embry

2 you to resign?

3 A. For the same reason that the U.S.  
4 Trustee asked us to resign.

5 Q. And I take it, because the U.S.  
6 Trustee took you off the committee, that you  
7 did not voluntarily resign; is that correct?

8 A. That is correct.

9 MS. STEINGART: Again, I don't  
10 know what the relevance is.

11 MR. COUSINS: I will tell you  
12 later. You are not going to want to  
13 hear it.

14 MR. COUSINS: Bonnie, can we take  
15 a five-minute break?

16 MS. STEINGART: Sure.

17 (Recess taken.)

18 Q. Mr. Embry, you were Magten's  
19 representative on the NorthWestern creditors  
20 committee; is that correct?

21 A. That's correct.

22 Q. And you are the one at Magten  
23 making trading decisions; is that correct?

24 A. That is correct.

25 Q. Has Magten purchased any -- any

1 T. Embry

2 other claims, whether trade claims or  
3 securities, other than QUIPS during a  
4 bankruptcy case?

5 A. No.

6 Q. Do you have an understanding as  
7 to the Bank of New York's role with respect to  
8 the NorthWestern QUIPS?

9 A. Yes.

10 Q. And what is your understanding?

11 A. That they used to be in the place  
12 that Law Debenture is today.

13 Q. And do you have an understanding  
14 as to why Bank of New York resigned as  
15 indentured trustee?

16 A. No.

17 Q. Does Magten have any claims  
18 against Bank of New York that you know of?

19 MS. STEINGART: In its role as  
20 indentured trustee?

21 MR. COUSINS: In its role as  
22 indentured trustee.

23 A. Not that I'm aware of today.

24 Q. Are you familiar with a complaint  
25 to avoid for Clark Fork transaction?



1 T. Embry

2 A. I have read it, yes.

3 Q. Do you have an understanding as  
4 to what's been requested in that complaint?

5 A. Yes.

6 MS. STEINGART: My understanding  
7 is that this deposition concerns the  
8 objection that we filed in connection  
9 with disclosure statement that is  
10 related to confirmation.

11 Now, as I understand it, the  
12 debtor has declined to engage in any  
13 discovery with respect to the adversary  
14 proceeding until the judge decides the  
15 motion with respect to standing.

16 The debtor has declined to  
17 produce documents with respect to that  
18 proceeding. And I would ask that you  
19 not ask questions or examine this  
20 witness with respect to the adversary  
21 proceeding.

22 If there is some dispute about  
23 that, I think we should call the judge.

24 MR. COUSINS: Okay.

25 MS. STEINGART: But I'm happy and

1 T. Embry

2 he is prepared to be here today and to  
3 testify about possible objections or  
4 objections that were suggested in our  
5 disclosure statement objection filing  
6 that relate to confirmation.

7 Q. Mr. Embry, do you have an  
8 understanding about the status of discovery in  
9 the adversary proceeding?

10 A. Not beyond what I have just  
11 heard.

12 Q. Has Magten asserted that the plan  
13 of reorganization can't be confirmed unless  
14 the adversary proceeding has been determined?

15 A. I believe that we have.

16 Q. Do you have an understanding as  
17 to why?

18 MS. STEINGART: To the extent  
19 that he is asking for advice of  
20 counsel, please reframe --

21 MR. COUSINS: I'm not asking for  
22 discussions.

23 Q. Your understanding.

24 A. Do I understand why?

25 Q. Yes.

1 T. Embry

2 A. I believe so.

3 Q. And what's that understanding?

4 A. As a creditor of Montana Power,  
5 the only -- or the remedy that is available to  
6 us is a constructive trust on the assets that  
7 were wrongly transferred to NorthWestern Corp.

8 The company is unwilling or  
9 unable to negotiate any settlement other than  
10 that.

11 Q. Did the adversary proceeding ask  
12 for a constructive trust on the assets?

13 A. I believe that's correct.

14 Q. And when did Magten become a  
15 creditor of Montana Power?

16 A. When it first bought the QUIPS.

17 Q. In connection with the adversary  
18 proceeding, Magten has asserted that BNY has  
19 refused to execute the third supplemental  
20 indenture if it contained a release of Clark  
21 Fork's obligations under the indenture.

22 A. Did you say E&Y or BNY?

23 Q. BNY, Bank of New York.

24 MS. STEINGART: We are not going  
25 to answer questions --

1 T. Embry

2 MR. COUSINS: You instruct him  
3 not to answer, I will get the judge.

4 MS. STEINGART: I'm instructing  
5 him not to answer. Get the judge.

6 (Discussion held off the record.)

7 Q. Has Magten had any communications  
8 with any other creditor of NorthWestern  
9 regarding a potential objection to  
10 confirmation of the NorthWestern plan?

11 A. We sent a letter to Bruce Karsh,  
12 which we produced. I have talked to two  
13 creditors that I can recall, and that's it.

14 Q. And Mr. Karsh is with Oakwood, is  
15 that correct?

16 A. It is not Oakwood. It is  
17 something else.

18 MS. STEINGART: I think it is  
19 Oaktree.

20 MR. COUSINS: I apologize.

21 A. Oaktree, yes.

22 Q. And what was the nature of the  
23 discussion with Oaktree?

24 A. That rather than -- rather than  
25 putting the Montana assets into a constructive

1 T. Embry

2 trust, that I was willing to accept a new  
3 preferred stock of the reorganized  
4 Northwestern Corporation, thereby eliminating  
5 the constructive trust.

6 Q. Do you have an understanding as  
7 to whether Oaktree is going to object to  
8 confirmation?

9 A. I have no understanding.

10 Q. Did you have any other  
11 conversations with Oaktree regarding  
12 objections to confirmation to the plan?

13 A. No, not that I remember.

14 Q. And you had previously testified  
15 that you talked to two other creditors.

16 Do you recall who those creditors  
17 were?

18 A. One is a fellow Kim Kirsten and  
19 the other is a man, Michael Ashner.

20 Q. Do you know who Kim Kirsten is  
21 with?

22 A. He is not with anyone. He is  
23 retired.

24 Q. Is he a private investor, do you  
25 know?

1 T. Embry

2 A. He is a retiree.

3 Q. Is he a creditor of NorthWestern?

4 A. I believe so.

5 Q. And Michael Ashton?

6 A. Ashner, A-S-H-N-E-R.

7 Q. Is he employed?

8 A. He is employed.

9 Q. By a creditor of NorthWestern?

10 A. By a creditor of NorthWestern?

11 Q. Yes.

12 A. No, not that I'm aware of.

13 Q. Is he a private investor?

14 A. He --

15 MS. STEINGART: Are you asking if  
16 that's his profession?

17 Q. Let me short-circuit it.

18 A. He has private investments, I  
19 believe.

20 Q. Let me short-circuit it.

21 Why were you talking to Michael  
22 Ashner regarding a potential objection to  
23 confirmation?

24 A. Because he called me and asked  
25 how he should vote on the plan.

1 T. Embry

2 Q. Is he a QUIP holder?

3 A. Yes, he is.

4 Q. And Mr. Kirsten, is he a QUIP  
5 holder?

6 A. He is.

7 Q. Have you ever talked to RCG  
8 Carpathia Master Fund about an objection to  
9 confirmation?

10 A. Not that I can recall.

11 Q. Have you ever heard of RCG  
12 Carpathia?

13 A. No, I haven't. I don't think it  
14 could -- I don't think that I have ever heard  
15 of it.

16 Q. Have you ever talked to  
17 Performance Capital in connection with the  
18 NorthWestern bankruptcy?

19 A. I have not.

20 Q. Have you ever talked to Ramius  
21 Capital Group about --

22 A. I have not.

23 Q. Have you talked to any other  
24 distressed traders regarding NorthWestern and  
25 objection to confirmation?

1 T. Embry

2 MS. STEINGART: So people who  
3 aren't creditors but traders?

4 MR. COUSINS: Yes.

5 MS. STEINGART: I see. Okay.

6 A. About -- I sent the -- this is an  
7 analyst out of Imperial Corp., who wrote a  
8 piece on NorthWestern, and I sent him our  
9 complaint, the company's motion for dismissal,  
10 and our comments on the motion for dismissal,  
11 but that's all.

12 Q. Do you have an understanding as  
13 to what Imperial Corp. is?

14 A. It is a broker/dealer.

15 Q. And does it do analyst reports?

16 A. It does.

17 Q. Does it hold for its own account?

18 A. I don't know.

19 Q. Do they have a particular area of  
20 expertise, to your knowledge?

21 A. Smaller companies.

22 Q. And do they specialize in  
23 distressed debt, to your knowledge?

24 A. They trade in it, yes.

25 Q. Is there any written



1 T. Embry

2 communication between you and either Mr.

3 Kirsten or Mr. Ashner?

4 A. Yes. There is a letter to  
5 Michael which we have provided to you, I  
6 believe.

7 MR. COUSINS: I don't believe  
8 that's been produced.

9 MS. STEINGART: You have what you  
10 have. As I sit here today, I don't  
11 have a microfilm of what I produced to  
12 you.

13 Q. Has Magten retained any financial  
14 advisor in connection with the NorthWestern  
15 bankruptcy?

16 A. No.

17 Q. Does Magten have any valuations  
18 with respect to NorthWestern?

19 A. No.

20 Q. Has Magten made any calculations  
21 regarding distributions it will receive in  
22 connection with confirmation of the plan?

23 A. Yes.

24 Q. What calculations has Magten  
25 made?

1 T. Embry

2 A. There are two. The first is  
3 2.1125 percent compounded quarterly from  
4 January 1, 2003 on \$25. The second one is our  
5 share of 2 percent.

6 Q. Explain to me what you mean by  
7 Magten's share of 2 percent.

8 A. Under the plan that is on the  
9 table now, Magten would share 2 percent of the  
10 equity with subordinated securities of  
11 NorthWestern Corp.

12 Q. Do you have an idea of, on a  
13 percentage base, how much of the QUIPS Magten  
14 holds?

15 A. In excess of 40 percent.

16 Q. When is the last time Magten  
17 acquired additional QUIPS?

18 A. A month ago.

19 Q. And how do you track acquisitions  
20 and dispositions of the QUIPS in the  
21 NorthWestern case?

22 A. Can you be --

23 Q. Do you have a spreadsheet, a  
24 printout?

25 A. It is kept on the computer.

1 T. Embry

2 Q. Is it on a spreadsheet?

3 A. No. It is on a listing.

4 Q. Do you have an understanding as  
5 to whether Magten is going to object to  
6 confirmation of a plan?

7 A. I do.

8 Q. And what is that understanding?

9 A. That we are going to object.

10 Q. And do you have an understanding  
11 as to the grounds that Magten is going to  
12 object?

13 A. Yes.

14 Q. And what are those grounds?

15 A. First, that we have the lawsuit  
16 outstanding.

17 Second, that we are incorrectly  
18 categorized or classified.

19 Third, that the convenience class  
20 is not de minimis.

21 Fourth, that releases are being  
22 granted to officers and directors with no  
23 payment for those.

24 And offhand, I can't remember the  
25 others.

1 T. Embry

2 Q. Let's take those in order.

3 With respect to the lawsuit, what  
4 is your understanding as to the basis for  
5 objection to confirmation with regard to the  
6 lawsuit?

7 A. That the Montana assets were  
8 wrongly transferred to NorthWestern.

9 Q. And how does that affect  
10 confirmation?

11 A. That if we were successful in our  
12 suit, the assets would have been put into a  
13 constructive trust which would be a different  
14 corporate structure than the one that is  
15 proposed in the plan.

16 Q. And if successful, do you have an  
17 understanding as to the effect that that would  
18 have on the QUIPS?

19 A. Yes.

20 Q. And what's that understanding?

21 A. That they would be paid in full.

22 Q. Does Magten assert that the plan  
23 cannot be confirmed until the adversary  
24 proceeding is determined?

25 A. Yes.

1 T. Embry

2 Q. I think you indicated that your  
3 second objection would be that the plan  
4 incorrectly categorizes the QUIPS; is that  
5 correct?

6 A. That's correct.

7 Q. And what's the basis of that?

8 A. The QUIPS are obligations of  
9 Montana Power and we are categorized or  
10 classified with the NorthWestern holding  
11 company, QUIPS or toppers.

12 Q. Does Magten hold any securities  
13 of Clark & Blackfut?

14 MS. STEINGART: Clark Fork &  
15 Blackfut, LLP.

16 A. No. The QUIPS are obligations of  
17 Clark & Blackfut.

18 Q. Other than the conviction, just  
19 to make it --

20 A. No.

21 Q. I think you indicated that the  
22 convenience class is not de minimis; is that  
23 correct?

24 A. That is my understanding, yes.

25 Q. And do you have an understanding

1 T. Embry

2 as to what an appropriate convenience class  
3 threshold should be?

4 A. It depends on the -- it would be  
5 nice to know the number of participants in the  
6 class and what their claims are individually  
7 and in the aggregate. Otherwise, I couldn't  
8 answer.

9 Q. And you indicated that there  
10 would be a forthcoming objection regarding the  
11 releases contained in the plan; is that  
12 correct?

13 A. I believe that's correct.

14 Q. And do you have an understanding  
15 as to the basis of that objection?

16 A. That the officers and directors  
17 of the company are being released from  
18 liability for now consideration.

19 Q. And does Magten have any claims  
20 against the officers and directors who are  
21 being released?

22 A. Yes.

23 Q. And do you have an understanding  
24 as to those claims?

25 A. Yes.

1 T. Embry

2 Q. And what is that understanding?

3 A. Let's see. The Northwestern  
4 Corporation owed a duty to Montana Power, as  
5 it was its creature or controlled entity. And  
6 it owed a duty to the creditors of Montana  
7 Power because NorthWestern was insolvent. And  
8 when a company is insolvent, the directors  
9 duty is to the creditors.

10 Secondly, the officers and  
11 directors of Montana Power allowed the  
12 transfer or the assumption of the debt. And  
13 the transfer of the assets, one, either -- and  
14 which they seem to have put into it a  
15 declaration, one, not caring what they said  
16 because they were under the complete  
17 domination of NorthWestern.

18 And, two, knowing that  
19 NorthWestern's numbers -- or should have known  
20 that NorthWestern's numbers were not any good  
21 at the time they made the transfer.

22 MR. COUSINS: Can we take a  
23 break? Judge Case says we can dial in  
24 now.

25 MS. STEINGART: Great, let's do

1 T. Embry

2 that.

3 (Discussion held off the record.)

4 (Conference call placed with

5 Judge Case; transcript bound

6 separately.)

7 MR. COUSINS: Let's take five

8 minutes.

9 MS. STEINGART: Of course.

10 (Recess taken.)

11 Q. Mr. Embry, you indicated that  
12 there may be claims against the officers and  
13 directors that would be affected by the  
14 releases; is that correct?

15 A. That's my understanding, but I'm  
16 not a lawyer.

17 Q. And how is Magten --

18 A. Can you -- I answered too  
19 quickly, what was that question?

20 (Record read.)

21 A. Yes, okay.

22 Q. Is Magten pursuing those claims  
23 against the officers and directors?

24 A. Yes.

25 Q. How?



1 T. Embry

2 A. We have a suit in Montana.

3 Q. What is the suit in Montana?

4 A. Against the officers and  
5 directors.

6 Q. And what are the nature of the  
7 claims in the suit in Montana?

8 A. Breach of fiduciary duty, amongst  
9 others. I'm not a lawyer. I have reviewed  
10 the legal documents, but I can't remember  
11 them.

12 Q. Do you know who the parties are  
13 in that litigation?

14 A. There are four individuals who  
15 purported to represent Montana Power at one  
16 time and then denied it.

17 Q. Those are the defendants?

18 A. That's correct.

19 Q. And do you know who the  
20 plaintiffs are, or plaintiff?

21 A. Myself.

22 Q. Is that Magten?

23 A. Yes.

24 Q. Are you familiar with the Public  
25 Utility Holding Act of 1935?

1 T. Embry

2 A. No.

3 Q. Has Magten been asked to join in  
4 any litigation in the bankruptcy claiming that  
5 NorthWestern somehow violated the Public  
6 Utility Holding Company Act?

7 A. No.

8 Q. Do you believe that Magten's  
9 distributions under the current plan are less  
10 than what Magten would receive under Chapter 7  
11 of the bankruptcy code?

12 MS. STEINGART: He means under  
13 liquidation.

14 A. Yes.

15 Q. Do you intend to object to  
16 confirmation on that basis?

17 A. I am going to leave the exact  
18 nature of the legal objections to counsel.

19 Q. And do you have an understanding  
20 as to why you believe Magten would receive  
21 less under the current plan as opposed to on a  
22 liquidation?

23 A. Yes.

24 Q. What's that understanding?

25 A. That the assets of Montana Power

1 T. Embry

2 would more than cover my obligation.

3 Q. Does this relate to the adversary  
4 being successful in connection with the  
5 adversary complaint?

6 A. Yes.

7 Q. Have you performed any analysis  
8 with respect to the recovery under Chapter 7  
9 versus under the current plan?

10 A. Yes, I believe I will get the  
11 same that Montana that I'm money good.

12 MS. STEINGART: Do understand  
13 Chapter 7 is a liquidation?

14 THE WITNESS: Yes, and if the  
15 adversary is won and the assets are not  
16 liquidated and we were the adversary,  
17 that the money would flow to the QUIPS  
18 before it went to the rest of the  
19 NorthWestern estate.

20 MS. STEINGART: Okay.

21 Q. Mr. Embry, you indicated that you  
22 performed two calculations, if I recall,  
23 2.1125 percent and then the calculation of  
24 Magten's share of 2 percent; is that correct?

25 A. Yes.

1 T. Embry

2 Q. Did you perform a liquidation  
3 analysis also?

4 A. No.

5 Q. Have you performed any other type  
6 of valuation of NorthWestern?

7 A. I have done several.

8 Q. I apologize.

9 A. I have done several.

10 Q. In addition to the two  
11 calculations that you talked about, you have  
12 done additional valuations; is that correct?

13 A. When I first -- yes.

14 Q. And what valuations have you  
15 done?

16 A. Multiples of EBITDA.

17 Q. And what do your valuations show  
18 with respect to multiples of EBITDA?

19 A. That the Montana Power QUIPS are  
20 covered 7 to 1 approximately, to the best of  
21 my recollection.

22 Q. Do you recall which multiple of  
23 EBITDA you used?

24 A. I believe it was around 7  
25 percent -- 7 times.

1 T. Embry

2 Q. Did you perform any other  
3 valuations?

4 A. No.

5 Q. Did you do a  
6 proceed-in-transaction valuation?

7 A. Excuse me?

8 MS. STEINGART: A --

9 Q. You are not an investment banker;  
10 is that correct?

11 A. That's correct.

12 Q. Did you look at any other market  
13 multiples in doing your valuation?

14 A. Yes, just generally.

15 Q. And can you describe what you  
16 did?

17 A. I think there is a Merrill Lynch  
18 research piece, there is ValuLine, whatever.

19 Q. Did you rely on the analysts'  
20 reports prior to first acquiring any QUIPS?

21 A. No.

22 Q. Did you rely on analysts' reports  
23 prior to acquiring any additional QUIPS?

24 A. No.

25 Q. There was some questions about

1 T. Embry

2 what due diligence Magten performed prior to  
3 its initial acquisition of QUIPS. Do you  
4 recall that?

5 A. Yes.

6 Q. Subsequent to the initial  
7 acquisition of QUIPS, what due diligence did  
8 Magten do with respect to NorthWestern?

9 A. Read the indenture and all the  
10 guaranty material, the amendments, all of  
11 that.

12 Q. So did you become familiar with  
13 the provisions in the indenture?

14 A. To the extent that it is possible  
15 for a nonlawyer.

16 Q. Did you review the first  
17 supplemental indenture at that point in time?

18 A. I believe so, yes.

19 Q. Did you review the second  
20 supplemental indenture?

21 A. I did.

22 Q. Did you review the third  
23 supplemental indenture?

24 A. I did.

25 Q. Did you review the amendment to

1 T. Embry

2 guaranty agreement at that time?

3 A. I cannot recall.

4 Q. Did you review the guaranty  
5 agreement at that time?

6 A. Yes.

7 Q. Did you review the guaranty  
8 assumption agreement at that time?

9 A. Yes.

10 Q. Did you review the Montana Power  
11 Capital 1 Trust at that time?

12 A. Yes.

13 Q. Can I ask, what time frame we are  
14 talking about?

15 A. The -- we purchased securities  
16 over an extended period of time and the -- I  
17 would say a week or so after the first  
18 purchase, we had reviewed -- a week or two  
19 after the first purchase, we have reviewed all  
20 of the documents I just referred to.

21 Q. Can I ask you what you mean by we  
22 "reviewed"?

23 A. That's the royal way.

24 Q. You?

25 A. Yes.

1 T. Embry

2 Q. Anyone else?

3 A. No.

4 Q. So you acquired your initial  
5 position in the QUIPS prior to reviewing all  
6 of these documents; is that correct?

7 A. Prior to reviewing the legal  
8 contracts underlying the QUIPS.

9 Q. After acquiring your initial  
10 position in the QUIPS, approximately a week or  
11 so thereafter you reviewed the legal documents  
12 that I'm referring to; is that correct?

13 A. Yes.

14 Q. Did you review the amended and  
15 restated trust agreement at that time?

16 A. Yes. I reviewed whatever was on  
17 file with the Securities and Exchange  
18 Commission.

19 Q. Do you recall if you reviewed the  
20 November 15, 2002 Asset and Stock Transfer  
21 Agreement?

22 A. I don't know.

23 Q. Do you know if you reviewed the  
24 unit purchase agreement dated for September  
25 29, 2000 for Montana Power?



1 T. Embry

2 A. Yes.

3 Q. Did you review that agreement?

4 A. I believe so.

5 Q. At that time did you review any

6 FERC filings?

7 A. I did not.

8 Q. Have you ever reviewed any of the

9 FERC filings?

10 A. Outside of documents in this

11 case, no.

12 Q. When do you recall the first time  
13 you reviewed various FERC filings?

14 A. The first time I saw FERC filings  
15 referred to in this, or quoted in this  
16 proceeding.

17 Q. At this period of time after your  
18 initial purchase of the QUIPS, did you review  
19 any Montana Public Service Commission filings?

20 A. No.

21 Q. Have you ever reviewed any  
22 Montana Public Service Commission filings?

23 A. Only what has been quoted in  
24 legal documents in this case.

25 Q. Has Magten sent or received any

1 T. Embry

2 communications with regard to the purchase or  
3 sale of NorthWestern; not the securities, but  
4 the company itself?

5 A. The -- I received one  
6 communication, I believe, from Paul Weiss.

7 MR. RATNER: Again, I want to  
8 just state for the record that the  
9 privilege runs to the committee and not  
10 to Magten. And so I would object to  
11 any information, privileged information  
12 that the witness will disclose.

13 Q. Without revealing the content, do  
14 you recall what the subject matter of that --

15 A. That a buyout firm wanted to  
16 acquire it.

17 Q. Do you recall which buyout firm?

18 A. Yes.

19 Q. Which one?

20 A. Lindsay Goldberg.

21 Q. That's the only communication you  
22 have had?

23 A. That's the only one that I  
24 recall.

25 Q. Do you intend to object to

1 T. Embry

2 confirmation on the basis that the settlement  
3 of claims between Class 7 and Class 8 is  
4 unfair or unreasonable?

5 A. I don't know for sure.

6 MS. STEINGART: I would just like  
7 to say for purposes of the record that  
8 as different settlements are put before  
9 the court and as the plan changes  
10 between the disclosure statement and  
11 the confirmation, we will be advising  
12 Magten as to the settlements and  
13 whether there is anything objectionable  
14 in them.

15 I don't know if you are referring  
16 to settlements that have been  
17 post-disclosure statement or recently,  
18 just so that there are no surprises.

19 THE WITNESS: I'm not even sure I  
20 even know what settlements -- if  
21 settlement is the distribution of  
22 securities under the plan. Is that 6  
23 and 7 or 7 and 8? Who is the senior  
24 unsecured debt?

25 MS. STEINGART: Well, that is not

1 T. Embry

2 involved in 6 and 7 and 7 and 8.

3 THE WITNESS: I don't know who 6  
4 is and who 7 is and --

5 MS. STEINGART: Then you don't  
6 know the answer to the question. So  
7 your answer has to be that you don't  
8 know.

9 A. I don't know.

10 Q. Do understand what class the  
11 QUIPS are classified in?

12 A. The best of my recollection,  
13 Class 7.

14 Q. I believe in connection with your  
15 disclosure statement objection, you asserted  
16 that the debtor was soliciting votes in bad  
17 faith. Do you recall that assertion?

18 A. Not off the top of my head, no.

19 Q. Do you have an understanding as  
20 to whether you are going to object to  
21 confirmation on that basis?

22 A. Well, I would certainly hope that  
23 we would, if the company was soliciting votes  
24 in bad faith.

25 MR. COUSINS: I'm handing to the

1 T. Embry

2 reporter a document marked Merrill  
3 Lynch. You can mark that as D-3.

4 (Merrill Lynch analyst report  
5 dated May 19, 2003 bearing  
6 production Nos. 001 through 025  
7 marked Debtor's Exhibit 3 for  
8 identification, as of this date.)

9 Q. I apologize. What I have handed  
10 is more than just the Merrill Lynch analyst's  
11 report. The first two pages, can you identify  
12 what the first two pages are, Mr. Embry?

13 A. This is a Merrill Lynch analyst  
14 report from the 19th of May, 2003.

15 Q. And have you seen this report  
16 before?

17 A. I have.

18 Q. And was this produced in response  
19 to our document production request?

20 A. Yes, it was.

21 MS. STEINGART: Just for the  
22 record, the document is Bates stamped  
23 001 through 025. It is a series of  
24 documents that have been made into a  
25 composite exhibit by debtor. And we

1 T. Embry

2 have no objection to the exhibit being  
3 a composite.

4 MR. COUSINS: Thank you.

5 Q. How is this responsive to our  
6 document production request?

7 MS. STEINGART: I object as to  
8 form.

9 Q. Do you know why it was produced?

10 A. It was -- I believe that it was  
11 called for in your document request.

12 Q. How do you keep your files with  
13 respect to your investment in NorthWestern,  
14 how are those files kept?

15 A. Mostly e-mail.

16 Q. Do you have copies of the  
17 documents that we discussed that you reviewed  
18 after your initial acquisition of the QUIPS?

19 A. Those are always on Bloomberg.

20 Q. So you don't keep paper copies,  
21 you primarily do it on the computer?

22 A. Yes.

23 Q. Is that your regular practice?

24 A. Yes.

25 Q. There are numbers at the bottom

1 T. Embry

2 of these documents that will have Magten's  
3 name and then some numbers after it on the  
4 bottom right.

5 A. Um-hmm.

6 Q. I think it will be quicker if we  
7 just go by that.

8 A. Okay.

9 Q. We are now looking at Magten 003  
10 and Magten 004. Do you recognize this  
11 document?

12 A. These are Merrill Lynch reports  
13 from the 25th of July, 2003.

14 Q. And do you have an understanding  
15 as to why this report was produced?

16 A. That it was -- I believe that it  
17 was produced because it was called for in your  
18 request for documents.

19 Q. If I could refer you to Bates  
20 stamps No. 005, 006 and 007, do you recognize  
21 this document?

22 A. This is a Standard & Poors  
23 research piece on NorthWestern that was  
24 supplied to me by the creditors' committee and  
25 provided to you because it seemed to fall

1 T. Embry

2 within the documents that I was to produce for  
3 you.

4 Q. In the first sentence it reads:

5 "It is very difficult to estimate recovery  
6 values" --

7 A. Wait a minute. First sentence of  
8 what?

9 Q. My apologies. Magten 005, first  
10 paragraph, middle of the first paragraph. I'm  
11 going to read a sentence to you.

12 A. Okay.

13 Q. "It is very difficult to estimate  
14 recovery values for unsecured creditors  
15 because unsecured obligations can increase  
16 materially during bankruptcy proceedings  
17 resulting in different (generally lower)  
18 recoveries than initial valuations would  
19 suggest."

20 Did I read that correctly?

21 A. I believe so.

22 Q. Would you agree with that  
23 statement?

24 MS. STEINGART: As a general  
25 matter or in connection with this



1 T. Embry

2 company?

3 Q. Tell me if you agree with that

4 statement.

5 MS. STEINGART: I object to the

6 form.

7 Q. You can answer.

8 A. I don't -- I mean, I have no

9 opinion on that statement.

10 Q. Well, you have been investing in

11 distressed debt since 1978; is that correct?

12 A. That's correct.

13 Q. And do you have some type of

14 model that pegs recovery on distressed debt in

15 every bankruptcy case?

16 A. No.

17 Q. Why not?

18 A. Because I don't.

19 Q. Is that something that exists?

20 MS. STEINGART: I'm sorry, such a

21 model?

22 MR. COUSINS: Yes.

23 A. I don't know.

24 Q. Down about three-quarters of the

25 first page, 005, the last sentence of the -- I

1 T. Embry

2 apologize, the last two sentences of the  
3 paragraph with the heading, "Valuation Method"  
4 reads:

5 "Holders of Trust Preferred could  
6 also lodge claims. It is difficult to  
7 assess the value of these claims in a  
8 bankruptcy proceeding."

9 Did I read that correctly?

10 A. I believe so.

11 Q. Do you agree with that?

12 MS. STEINGART: I object as to  
13 form.

14 A. No.

15 Q. Why don't you agree with that?

16 A. Because in the case of the  
17 Montana Power preferred, I didn't find it  
18 difficult to assess the value of the claims.

19 Q. When did you perform your  
20 valuations based on multiple EBITDA?

21 MS. STEINGART: That he described  
22 earlier?

23 MR. COUSINS: Yes.

24 MS. STEINGART: Okay.

25 A. Probably in the first part of the

1 T. Embry

2 year, 2003.

3 Q. After you acquired the initial

4 QUIPS?

5 A. No, I don't believe so.

6 Q. Before the initial QUIPS?

7 A. Yes.

8 Q. Other than reviewing the public  
9 record and performing the valuation models  
10 that we discussed earlier, what did you do  
11 prior to acquiring the initial tranche of  
12 QUIPS?

13 A. I read what was available in the  
14 S.E.C. documents for Montana Power, Montana  
15 Capital and NorthWestern. Then on the  
16 Bloomberg machine.

17 Q. And why do you believe that it  
18 was not difficult to value the QUIPS in  
19 connection with NorthWestern?

20 A. Because NorthWestern could not  
21 make a promise, could not fulfill the promise  
22 that it made to pay the QUIPS.

23 Q. How does that failure to fulfill  
24 a promise affect value?

25 A. Therefore, they, I believe -- not

1 T. Embry

2 being a lawyer, but I didn't believe that they  
3 could properly assume the QUIPS and the  
4 transfer of the Montana assets.

5 Q. Well, you testified before that  
6 one of the remedies you were seeking is a  
7 constructive trust; is that correct?

8 A. That is correct.

9 Q. And how would the constructive  
10 trust satisfy your claims in full?

11 A. My understanding, although not  
12 being a lawyer, is that the Montana assets  
13 would be segregated. That value would flow to  
14 the preferred and then to the common  
15 shareholder, NorthWestern Corp. and that the  
16 result would only be that the unsecured  
17 creditors of the holding company.  
18 NorthWestern would get less than they are  
19 getting today, or promised in the plan.

20 Q. Where would that value flow from?

21 A. From the Montana assets.

22 Q. And what Montana assets would  
23 that be?

24 A. Power plants.

25 Q. Do you have an understanding as

1 T. Embry

2 to what Montana assets there are?

3 A. Plants that produce power,

4 distribution facilities.

5 Q. What type of power plants?

6 A. I don't know. Whatever they

7 have, hydroelectric, coal.

8 Q. Do you know if NorthWestern has

9 hydroelectric power plants?

10 A. Yes.

11 Q. And they do have hydroelectric

12 power plants?

13 A. I think -- I believe so, yes.

14 Q. Does NorthWestern have coal power

15 plants?

16 A. I don't know for sure. I believe

17 so.

18 Q. Any other power plants, other

19 than coal and hydroelectric?

20 A. I don't know.

21 Q. If you could turn to Bates No.

22 006, there is a heading called "Assumptions."

23 It is about the middle of the page. The

24 sentence reads:

25 "Standard & Poors believes that

1 T. Embry

2 the unsecured debt issued by the former  
3 utilities is not likely to have  
4 priority over any other unsecured debt  
5 issued at the corporate level due to  
6 the flat corporate structure created by  
7 NorthWestern when it made the two  
8 utilities operating divisions and  
9 eliminated NorthWestern Energy LLC."

10 Did I read that correctly?

11 A. I believe you did.

12 Q. And do you agree with that  
13 statement?

14 A. No.

15 Q. You talked about a 7 times EBITDA  
16 multiple?

17 A. Yes.

18 Q. Did you get that multiple from  
19 the Standard & Poors report?

20 A. I don't know exactly where I got  
21 that multiple.

22 MS. STEINGART: There has been no  
23 testimony that he had this at the time  
24 he purchased. I just want to remind  
25 you of that.

1 T. Embry

2 MR. COUSINS: You are wrong. He  
3 did the valuation before he purchased.

4 MS. STEINGART: No, I'm talking  
5 about this document.

6 MR. COUSINS: Okay. Well, then  
7 he answered it.

8 MS. STEINGART: No, I understand  
9 he answered. It is just that I didn't  
10 know if you were confused in terms of  
11 the questions about when he had this.

12 Q. Mr. Embry, can you tell me who  
13 Alan A. Brown is?

14 A. Alan Brown used to work for me.

15 Q. And do you know where he works  
16 now?

17 A. He works for Concordia.

18 Q. What is Concordia?

19 A. Concordia is a hedge fund.

20 Q. Is it located in New York?

21 A. I believe so, yes.

22 Q. And when did he work for you?

23 A. He left in 2001 or 2002.

24 Q. And what position did he hold  
25 when he worked for you?

1 T. Embry

2 A. He was an analyst.

3 Q. Was he a managing director?

4 A. Yes, I believe so.

5 Q. And what were his  
6 responsibilities as a managing director?

7 A. To look for investment ideas.

8 Q. Did Mr. Brown look at the  
9 investment on the QUIPS?

10 A. He was not working for me at the  
11 time.

12 Q. If you turn to what's been marked  
13 as Magten Bates No. 008 through 014, I ask you  
14 if you recognize that document.

15 A. This is a research report from  
16 Imperial Capital.

17 Q. Who is Imperial Capital?

18 A. Imperial Capital is a  
19 broker/dealer.

20 Q. And are they recognized as  
21 specializing in high yield research?

22 A. I don't know.

23 Q. Have you ever heard of Imperial  
24 Capital prior to seeing this document for the  
25 first time?



1 T. Embry

2 A. Yes.

3 Q. In what context?

4 A. We purchased securities through  
5 them, sold securities through them.

6 Q. Does Magten regularly purchase  
7 securities through Imperial Capital?

8 A. Regularly is not a -- not  
9 regularly.

10 Q. Which broker/dealers do you  
11 normally deal with?

12 A. Bear Stearns.

13 Q. When you acquired the QUIPS, how  
14 did you acquire them again?

15 A. Through various broker/dealers.

16 Q. And at what prices did you  
17 acquire the QUIPS?

18 MS. STEINGART: I object to the  
19 form. I'm sorry, I object to the  
20 question. It is not relevant and I'm  
21 instructing him not to answer.

22 Q. If you could turn to Bates Nos.  
23 015 and 016, do you recognize this letter?

24 A. Yes.

25 Q. And can you tell me what this

1 T. Embry

2 letter is?

3 A. It is the letter to Bruce Karsh.

4 Q. Do you understand the purpose of  
5 this letter?

6 A. Yes.

7 Q. And what's the purpose?

8 A. To see if we could settle this  
9 suit.

10 MS. STEINGART: If you note on  
11 the front page, it indicates it is for  
12 settlement purposes only. And while  
13 that doesn't preclude inquiry here, I  
14 would just note that for the record.

15 Q. The middle paragraph on the first  
16 page reads:

17 "While everyone is entitled to be  
18 passionate about their respective  
19 points of view, we should never allow  
20 professionals for a creditors'  
21 committee or the Chapter 11 process to  
22 preclude any arm's length and fair  
23 dialogue."

24 Did I read that correctly?

25 A. I believe so.

1 T. Embry

2 Q. May I ask you what you meant by  
3 "passionate"?

4 MS. STEINGART: No, I'm  
5 instructing him not to answer that  
6 question.

7 Is there something you want to  
8 ask him about in connection with the  
9 objection to confirmation, you may.  
10 But there is a settlement document and  
11 I am not going to permit general  
12 inquiry about the writing and the  
13 communication with Mr. Karsh.

14 If there is something here that  
15 you think has to do with an objection  
16 that has been lodged, you may ask it.  
17 But that question doesn't go to that,  
18 and it is really just inquiry about a  
19 settlement proposal which is not  
20 something that should be happening  
21 anyway.

22 Q. If you could turn to Bates No.  
23 Magten 017. I ask you to identify that  
24 document, if you can.

25 A. This is an e-mail from Bruce

1 T. Embry

2 Karsh to myself.

3 Q. And do you understand the purpose  
4 of this e-mail?

5 A. To answer my settlement letter of  
6 May 27.

7 Q. And do you have an understanding  
8 as to what Oaktree Capital's response was?

9 A. That I didn't have -- I didn't  
10 have an investment, really, in the -- they  
11 weren't interested in changing their position.

12 Q. Well, Magten had asked Oaktree  
13 to -- for some type of an alliance; is that  
14 correct?

15 MS. STEINGART: I object. I'm  
16 instructing him not to answer.

17 MR. COUSINS: Well, this isn't  
18 protected.

19 MS. STEINGART: Well, this has --  
20 you are referring to his earlier  
21 settlement offer. This isn't marked  
22 settlement, this is marked settlement.  
23 You can ask him about the response.

24 The proposal, the settlement proposal  
25 speaks for itself.

1 T. Embry

2 Q. Was Oaktree responding to your  
3 request to form an alliance?

4 A. No.

5 Q. Did Oaktree indicate that it was  
6 not going to object to the plan as drafted?

7 A. No.

8 Q. They didn't say that. What did  
9 they say?

10 A. They said that they were not  
11 going to change their position. And that they  
12 had slightly more Montana bonds than  
13 NorthWestern, and would be benefited  
14 financially by the success of our suit.

15 Q. Now, I note that there is, I  
16 believe, a response on Magten Bates No. 018.  
17 Did you have any other conversations with  
18 Oaktree, other than this e-mail?

19 A. No.

20 Q. Oaktree is on the committee; is  
21 that correct?

22 A. That is correct, to the best of  
23 my knowledge.

24 Q. If you could turn to Magten Bates  
25 No. 020, can you identify that document?

1 T. Embry

2 A. This is -- this is a Bloomberg I  
3 believe -- I don't know. It is a Bloomberg  
4 that I forwarded to Meghan Costello of Fried,  
5 Frank, Harris, Shriver & Jacobson.

6 Q. Why did you forward it to her?

7 A. To inform her what somebody  
8 thought about the -- about what was going on.

9 Q. Has a portion of this e-mail been  
10 redacted, to your knowledge?

11 A. I have no idea.

12 MS. STEINGART: I don't think so.  
13 I'm looking at it. We usually mark it  
14 if we redact it. He didn't do the  
15 markings and the Bates stamp -- we did  
16 that and we usually mark it. I will  
17 check it and confirm that, but I don't  
18 believe it has been redacted.

19 Q. If you could turn to Magten 021,  
20 the same question. Mr. Embry, I will take a  
21 representation from counsel, you may not be  
22 able to answer whether the top portion has  
23 been redacted.

24 MS. STEINGART: I don't know. I  
25 really don't know. I will have to

1 T. Embry

2 check that.

3 (Discussion off the record.)

4 MS. STEINGART: Well, I have been  
5 informed that it has been redacted and  
6 it should say so. But because it  
7 was -- Ms. Costello is a lawyer who  
8 works with me and I don't know what the  
9 content of this was, as I sit here  
10 today. But the attachments that were  
11 with it, that did go to persons outside  
12 of the firm, have been provided.

13 Q. If you could turn to Magten 025.  
14 Can you identify that document?

15 A. This is another Bloomberg. This  
16 time from Credit Suisse First Boston on  
17 something that came over the Bloomberg that I  
18 forwarded to Meghan Costello just for her  
19 information.

20 MR. COUSINS: And, again, Bonnie,  
21 do you know if that has been redacted?

22 MS. STEINGART: I don't believe  
23 it has been redacted, but I will  
24 provide you with another set that marks  
25 each and every spot that is redacted.

1 T. Embry

2 Q. There is a reference down at the  
3 bottom about body language. Do you have an  
4 understanding of what that means?

5 MS. STEINGART: On page 25?

6 MR. COUSINS: Page 25.

7 A. No.

8 Q. I'm sorry, I didn't hear your  
9 answer.

10 A. I don't, really. It is not my  
11 memo.

12 MR. COUSINS: Can we take five?

13 MS. STEINGART: Um-hmm.

14 (Recess taken.)

15 Q. Mr. Embry, is there any reason  
16 why you could not truthfully answer the  
17 questions that I posed today?

18 MS. STEINGART: I object. He is  
19 not answering that question.

20 Q. Are you on any medication?

21 MS. STEINGART: You can answer  
22 that question.

23 Q. The question is: Are you on any  
24 medications that would limit your ability to  
25 respond truthfully to the questions that I



1 T. Embry

2 posed?

3 A. No.

4 MR. COUSINS: Bonnie, there were  
5 a couple of things that I'm going to  
6 ask that you produce. And I want to  
7 keep the deposition open until I have  
8 seen it. Records of trades --

9 MS. STEINGART: When you provide  
10 a document request that has those  
11 things, then we will respond to the  
12 request.

13 MR. COUSINS: Let me make my  
14 record. There is a letter to Michael  
15 Ashner. There is calculations, I think  
16 the testimony was 2.1125 percent and  
17 secondarily, Magten's share of 2  
18 percent.

19 THE WITNESS: Excuse me.

20 MS. STEINGART: No, no, no. Let  
21 him finish. That's okay.

22 MR. COUSINS: There were  
23 additional valuations that were derived  
24 that were based on multiples of EBITDA.  
25 And, actually, I think it was a

1 T. Embry

2 computer listing of trades.

3 If I have to follow-up with a  
4 letter, I will, but I have no further  
5 questions subject to leaving the  
6 deposition open and limiting it to  
7 additional questions regarding those  
8 documents.

9 MS. STEINGART: Okay. The  
10 document request that was provided in  
11 connection with the notice of  
12 deposition made no request for either  
13 trades, computer printout of trades or  
14 any of that. So to the extent that you  
15 would like to serve a document demand,  
16 that's appropriate. That contains such  
17 a request. I will deal with the  
18 request when it is made.

19 As to the other documents, to the  
20 extent that they exist, we will provide  
21 them. But at this point, I am unaware  
22 that they do exist. But we will go  
23 back and look and provide them if they  
24 do exist.

25 Does the committee have any

1 T. Embry

2 questions?

3 MR. RATNER: No, the committee  
4 has no questions.

5 MS. STEINGART: Well, I have some  
6 questions.

7 EXAMINATION BY MS. STEINGART:

8 Q. Mr. Embry, you testified earlier  
9 about a purchase of stock that was made on  
10 December 18 of 2003. Do you recall that?

11 A. Yes.

12 Q. I'm sorry --

13 A. Yes.

14 Q. Now, Magten was appointed to the  
15 creditors' committee on or about the end of  
16 November; is that correct?

17 A. That's correct.

18 MR. COUSINS: Objection. That's  
19 not what his testimony was. Go ahead.

20 THE WITNESS: Well, I --

21 MR. COUSINS: He didn't know when  
22 it was appointed. I asked him that.  
23 You are asking leading questions.

24 MS. STEINGART: Yes, it is a  
25 leading question and we are in a trial.

1 T. Embry

2 MR. COUSINS: It is your witness.

3 MS. STEINGART: I see.

4 MR. COUSINS: Stop testifying.

5 MS. STEINGART: Well, you have  
6 your objection.

7 Q. Now, prior to that time had  
8 Magten -- prior to Magten's appointment to the  
9 committee, Magten had purchased QUIPS,  
10 correct?

11 A. That is correct.

12 Q. After Magten was appointed to the  
13 committee, and before Magten attended meetings  
14 with the creditors committee, did Magten  
15 receive confidential information?

16 A. No.

17 Q. At the time that Magten attended  
18 the first meeting of the creditors committee,  
19 had Magten already placed the order that was  
20 closed on December 18th for the purchase of  
21 QUIPS?

22 A. Yes.

23 Q. Did Magten direct any broker to  
24 purchase any QUIPS on its behalf, from the  
25 time it attended the first meeting of the

1 T. Embry

2 creditors committee until it was removed from  
3 the creditors committee?

4 A. No.

5 Q. After Magten was removed from the  
6 creditors committee, did Magten purchase  
7 additional QUIPS?

8 A. Yes.

9 Q. And just to clarify, prior to the  
10 first committee meeting, did Magten receive  
11 any confidential information concerning the  
12 debtor?

13 A. We received no confidential  
14 information. And the information we received  
15 at the first meeting may or may not have  
16 been -- it was confidential, but it was not  
17 important.

18 Q. Was it related to the -- when you  
19 say that the -- I don't want to go into the  
20 material that was received at the first  
21 creditors committee meeting, because that  
22 might be offensive to the committee.

23 MS. STEINGART: I have no further  
24 questions.

25 FURTHER EXAMINATION

1 T. Embry

2 BY MR. COUSINS:

3 Q. Mr. Embry, when was the first  
4 creditors' meeting?

5 MS. STEINGART: That Magten  
6 attended.

7 A. That I attended?

8 Q. Yes.

9 A. In December.

10 Q. Do you recall the date?

11 A. I don't recall the date.

12 Q. You recall the date that you  
13 bought stock, but you don't recall the date of  
14 the first creditors committee meeting?

15 A. No. I am -- I am agreeing here  
16 that the first creditors' meeting was on the  
17 18th. And I will agree that stock was  
18 purchased either that day or the next day on  
19 an outstanding order that had been placed,  
20 say, a week or two before.

21 Q. Do you recall the exact date that  
22 the outstanding order was placed?

23 A. I do not.

24 Q. I think you said the computer  
25 listing of trades, would that reflect when

1 T. Embry

2 that order was placed?

3 A. Yes. It will reflect trades with  
4 that broker prior to those.

5 MS. STEINGART: He asked if it  
6 reflected --

7 A. No, it won't reflect the placing  
8 of the order.

9 Q. Will it reflect the actual  
10 purchase, however?

11 A. Yes, it will.

12 Q. Do you have a telephone record  
13 that will reflect the placing of that order  
14 with that broker?

15 A. No.

16 Q. Who was the broker?

17 A. Tradition Asiel, I believe it is  
18 A-S-I-E-L.

19 Q. Does anyone else at Magten have a  
20 record of the placement of that order?

21 A. No.

22 Q. Your secretary wouldn't have it  
23 either?

24 A. No.

25 Q. Now, your counsel asked you about

1 T. Embry

2 confidential information in your possession  
3 prior to the December meeting that Magten  
4 attended with the committee; is that correct?

5 A. Yes.

6 Q. How about material nonpublic  
7 information?

8 A. No material nonpublic  
9 information.

10 Q. What information did you receive  
11 from the committee? And I'm not asking about  
12 the communication, but what information did  
13 you receive from the committee between the  
14 time of your appointment and the first  
15 meeting?

16 A. I don't recall.

17 Q. Would your records reflect what  
18 information you received?

19 A. I believe that it would -- I -- I  
20 don't know. I mean, I believe it.

21 MS. STEINGART: You believe what.

22 A. I believe that we should have the  
23 e-mails from that period of time, which you --

24 Q. And those e-mails are still  
25 intact?



1 T. Embry

2 A. Yes.

3 MR. COUSINS: I will request this  
4 in writing, too, but I would ask that  
5 counsel take steps to avoid  
6 despoliation of the e-mails that Mr.  
7 Embry got from the creditors committee.

8 MS. STEINGART: I think that  
9 request is insulting and not necessary.  
10 I'm going to pretend we didn't hear it.

11 Mr. Embry received documents and  
12 we were not producing the documents  
13 that he had received from the  
14 committee. To the extent that you want  
15 those and you want to make a request of  
16 those, we are happy for you to make  
17 such a request.

18 In response, we I guess we would  
19 provide copies of those documents to  
20 counsel for the committee and counsel  
21 for the committee can decide which of  
22 those documents they wish to produce to  
23 you.

24 MR. RATNER: Thank you, we will  
25 take that under advisement.

1 T. Embry

2 MR. COUSINS: Thank you, we are

3 done.

4 (Time noted: 3:09 P.M.)

5 \_\_\_\_\_

6 Talton Embry

7 Subscribed and sworn to

8 before me this \_\_\_\_\_ day

9 of \_\_\_\_\_ 2004.

10 \_\_\_\_\_

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C E R T I F I C A T E

STATE OF NEW YORK       )  
                                  ) ss.:  
COUNTY OF NEW YORK     )

I, ANNELIESE R. TURSI, a  
Registered Professional Reporter and Notary  
Public within and for the State of New  
York, do hereby certify:

That I reported the proceedings in  
the within-entitled matter, and that the  
within transcript is a true record of  
such proceedings.

I further certify that I am not  
related, by blood or marriage, to any of  
the parties in this matter and that I am  
in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 28th day of July,  
2004.

  
\_\_\_\_\_  
ANNELIESE R. TURSI, RPR

1

2 July 27, 2004

3

I N D E X

4

WITNESSPAGE

TALTON EMBRY

5

Examination by Mr. Cousins

3

99

6

Examination by Ms. Steingart

96

7

E X H I B I T S

8

DEBTOR'SFOR IDENTIFICATIONPAGE

9

1 Document entitled "Order Permitting  
Securities Trading Upon  
Establishment of Ethical Wall  
(Re: Docket No. 257)"

9

10

11

12

2 U.S. Bankruptcy Court, District  
of Delaware, Notice of Electronic  
Filing with attachments

37

13

14

3 Merrill Lynch analyst report  
dated May 19, 2003 bearing  
production Nos. 001 through 025

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**COPY EXHIBITS**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----x  
In re: Chapter 11  
Case No.  
NORTHWESTERN CORPORATION, 03-12872 (CGC)

Debtor,  
-----x

July 27, 2004  
11:59 A.M.

DEBTOR EXHIBIT NOS. 1-3  
in the Deposition of  
TALTON EMBRY